In the case of *Emperor* v. *Chaturbhuj Narain Choudhury* [1] Rowland J. after considering most of the authorities on the point, said at page 352:—

"It would serve no useful purpose to examine the facts of all those decisions in the attempt to arrive at a rule enabling one to say that this or that overt act will or will not amount to criminal misappropriation or breach of trust. I am quite unable to deduce any such hard and fast rule from the decision, and I do not think that there is any such rule."

He then said that the principle to be followed was correctly laid down in two cases — (1) *Harakrishna Mahatab* v. *Emperor*,[2] and (2) *Crown* v. *Dina*.[3]

In the first case Fazl Ali J. said:—

"It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest. But..... the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should however not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention."

The second case, according to his Lordship, proceeded directly on the view that the mental act or intent to deprive the master of his property is the gist of the offence. With this statement of the law I respectfully agree.

The intention of the appellant in failing to credit the company with the two amounts received by him and in retaining them could be inferred from the surrounding circumstances. He failed to produce the schedule of "overdue" debtors when asked to do so and failed to turn up at the office until five days later. The two sums were not entered in the company's books because the necessary vouchers were not submitted to the clerks concerned. These vouchers were among the documents found by Mr. Anderson in the appellant's house, documents which the appellant had no authority to remove from the office. The appellant kept the cash box and the key thereof.

The only inference that can be drawn is that the appellant deliberately withheld these vouchers to ensure that the amounts involved were not credited to the company accounts while he retained the money and that his intention in doing so was dishonest. The learned President disbelieved the appellant's story that P.W.6, the assisant cashier, must have omitted to send the vouchers for the amounts therein to be entered in the company's books and convicted him and rightly so. I see no reason to interfere with the sentence.

The appeal is dismissed.

Appeal dismissed.

TAN TEK YAN v. SAMUEL

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) April 6, 1964]

[Singapore — Federal Court Civil Appeal No. 18 of 1963]

Practice and Procedure — Appeal — Finding of fact — Credibility of witnesses — When appellate court will upset such finding.

Practice and Procedure — Appeal — Point not taken at trial — Whether it can be taken on appeal.

Landlord and Tenant — Non-controlled premises — Written tenancy agreement — Termination of tenancy — Withdrawal of action — Tenant remaining in possession — Rent neither tendered nor demanded — Subsequent notice to quit — Allegation of supplementary oral agreement — Whether there was waiver of notice to quit.

An appellate court even though it is disposed to come to a different conclusion on the printed evidence will not upset the finding of a trial judge on a question of fact which turned solely on the credibility of witnesses unless it is satisfied that the trial judge was plainly wrong.

A point, not taken at the trial, and presented for the first time in the appellate court ought to be most jealously scrutinised. An appellate court ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy has arisen at the trial. The rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility could prevent the point from succeeding, it cannot be taken afterwards.

Cases referred to:—

(1) *The Tasmania* (1890) 15 App. Cas. at p. 227.

(2) *Ex parte Firth, In re Cowburn* (1882) 19 Ch. D. 419, C.A.

FEDERAL COURT.

R. H. V. Rintoul for the appellant.

C. S. Wu for the respondent.

Wee Chong Jin C.J. (Singapore): This is an appeal from the judgment of Azmi J. in favour of the respondent in an action for recovery of possession of non-controlled premises and for rent and mesne profits.

The appellant became the tenant of the premises under a written tenancy agreement dated 18th August 1960 at a monthly rent of $250. Some months after the appellant had entered into possession under this agreement, the respondent terminated the tenancy on 30th April 1961 by giving the appellant a notice to quit dated 29th March 1961.

After the expiration of this notice to quit the respondent commenced proceedings in the High Court at Johore Bahru against the appellant for recovery of possession, and arrears of rent and mesne profits. This action came on for trial on 20th November 1961 and during the course of the hearing the respondent withdrew his action which was therefore dismissed. The appellant remained in possession of the premises and no rent was tendered or paid by the appellant or demanded by the respondent until 22nd May 1962 when the appellant through his solicitors wrote to the respondent tendering the balance due for rent for the months commencing 1st January 1961 and ending 31st May 1962 after certain deductions which he claimed he was entitled to make. This tender was not accepted by the respondent.

On 27th July 1962 the respondent through his solicitors issued another notice to quit which was served on the appellant requiring the appellant to quit and deliver up possession of the premises on 31st August 1962. The respondent's solicitors on 30th July 1962 wrote to the appellant's solicitors enclosing a copy of this notice to quit. This letter is in the following terms:

"Messrs. Goh Bin Lay & Co.,
33, Jalan Ibrahim,
Johore Bahru,

Dear Sirs,

re: Premises No. 11-B, Jalan Jin Quee
Johore Bahru (Top Floor).

We enclose herewith for your information a copy of a notice to quit dated the 27th day of July, 1962, which we have served upon your client.

Our client denies that your client has any subsisting tenancy, but to avoid any doubt from arising, we are serving upon your client a further notice to quit. Our instructions are to commence proceedings for recovery of possession on the expiry of the notice.

Our client further denies that he has ever agreed not to evict your client so long as he pays the rent due on due date, or made any agreement to the effect pleaded in the defence in the previous proceedings, but in any event our client regards himself as discharged forthwith from any such agreement if any, which is denied, by reason of the defendant's failure to pay or tender any rent for mesne profits for the past several months.

Yours faithfully,

(sd.) Donaldson & Burkinshaw."

As the appellant continued to remain in occupation the respondent commenced fresh proceedings in the High Court at Johore Bahru by way of a writ of summons dated 15th September 1962 for recovery of possession and arrears of rent and mesne profits.

In his defence the appellant admitted that he became tenant under the terms contained in the written agreement of 18th August 1960 but alleged that there was a supplementary oral agreement that so long as he continued to pay the rents due on the due dates the respondent would not evict or cause him to be evicted from the demised premises. In his defence he also alleged that he paid the respondent a sum of $3,000 by way of a premium or tea money.

At the trial the appellant gave evidence that it was also agreed that in consideration of his paying the respondent a lump sum of $3,000 the respondent would do certain agreed additions and alterations to the premises. His evidence was that he paid this $3,000 as well as the agreed premium but the respondent failed to carry out his part of the bargain.

The learned trial judge rejected the appellant's evidence that there was a supplementary oral agreement and that he paid to the respondent a total sum of $6,000 and held that the tenancy created by the written agreement was a monthly one and that this monthly tenancy was determined on the 30th April 1961 by the notice to quit of the 29th March 1961.

Before us it was contended that the trial judge was wrong in coming to the conclusion that there was no supplementary oral agreement in that he failed to consider the discrepancy between the respondent's evidence before him and the evidence in the previous action as also the fact that the written agreement contained no terms as to the duration of the tenancy. I am unable to accept this contention. It has been laid down on numerous occasions that an appellate court even though it is disposed to come to a different conclusion on the printed evidence will not upset the finding of a trial judge on a question of fact which turned solely on the credibility of witnesses unless it is satisfied that the trial judge was plainly wrong.

In this case on the printed evidence I am not disposed to come to a different conclusion from that arrived by the trial judge and still less am I satisfied that the trial judge was plainly wrong.

The other contention put forward by counsel for the appellant was that the notice to quit dated 29th March 1961 was subsequently waived by the notice to quit dated 27th July 1962 and that therefore the respondent was only entitled to mesne profits from the expiration of the second notice to quit. I am also unable to accept this contention. This point was not taken at the trial and was presented for the first time in this court. As Lord Herschell in *The Tasmania* [1] at page 227 said "A point, not taken at the trial, and presented for the first time in the Court of Appeal....ought to be most jealously scrutinised ....A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial....". Even though there is some evidence upon the matter, "the rule is

that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility could prevent the point from succeeding, it cannot be taken afterwards" (see *Ex parte Firth, In re Cowburn,*[2] *per* Jessel, M.R. at page 429).

In the present case I am not satisfied beyond doubt that we have before us all the facts bearing upon this new contention as completely as would have been the case if it had arisen at the trial.

In any event I am of the opinion that the letter dated 30th July 1962 addressed to the appellant's solicitors by the respondent's solicitors clearly shows that the act of waiver relied on was done not with the intention of recognising an existing tenancy but with the intention as stated in the letter of avoiding any doubt from arising as to whether or not there was any subsisting tenancy.

For these reasons I am of the opinion that the appeal should be dismissed with costs.

Thomson L.P. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw*; *Goh Bin Lay & Co.*

LEE KIM LENG v. REGINA

[A.Cr.J. (Chua J.) April 10, 1964]

[Singapore — Magistrate's Appeal No. 101 of 1963]

Penal Code s. 304A — Taxi suddenly stopping at pedestrian crossing — Appellant's car colliding rear of taxi lurching stationery taxi into pedestrian resulting in death — Whether death caused by direct result of rash and negligent act — Criminal liability.

Road Traffic — Taxi stopping suddenly without signal at pedestrian crossing — Car behind taxi colliding with rear of taxi causing taxi to lurch into pedestrian — Whether taxi driver negligent.

To impose criminal liability under section 304A of the Penal Code it is necessary that the death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervantion of another's negligence. It must have been the *causa causans*; it is not enough that it may have been *causa sine qua non.*

In this case the deceased a pedestrian, was killed while she was using the pedestrian crossing by an impact caused by the appellant's car colliding with the rear portion of a stationery taxi (which had stopped suddenly at the said crossing) forcing the taxi to lurch into her. He was convicted under section 304A of the Penal Code and sentenced to 4 months imprisonment and disqualified from driving any motor vehicle for 3 years. On appeal,

Held: (1) the taxi driver was negligent in that he failed to see the pedestrian until he was almost upon her and he had stopped suddenly without giving any signal;

(2) the appellant therefore was not wholly or mainly responsible for the collision and the appeal should be allowed.

Case referred to:—

(1) *Emperor* v. *Omkar Ram Pratap* (1902), 4 Bom. L.R. 679.

MAGISTRATE'S APPEAL.

H. E. Cashin for the appellant.

S. R. Chapkhana for the respondent.

Chua J.: The appellant in this case was convicted by a District Court under section 304A of the Penal Code and sentenced to 4 months' imprisonment and disqualified from driving any motor vehicle for a period of 3 years.

I allowed the appeal and said that I would give my reasons later which I now proceed to do.

The learned district judge accepted the evidence of Goh Teck Seng, an eye witness to the accident, who the learned district judge said "gave trustworthy evidence before me in Court."

Goh Teck Seng in his evidence said:

" . . . . . .

I was riding a scooter from Geylang towards town and had passed the Geylang Bridge. I reached a pedestrian crossing. I saw an old woman walking along the pedestrian crossing from my left to right. I stopped my scooter as I saw people walking across. I only saw one old woman. As I stopped my scooter the woman was to my left and 3 feet or 4 feet from the start of the pedestrian crossing.

She reached the centre of the road. When this woman was somewhere in the middle of the road I saw a taxi coming from the town side. By the time the taxi came to a stop the old woman was somewhere in front of it. The taxi was travelling between 20 and 30 m.p.h. It stopped. The taxi driver suddenly stopped his taxi when he saw the old woman walk in front.

A car which was travelling behind the taxi knocked into the rear of the taxi. The stationary taxi moved forward and knocked into the woman. She was then in about the centre portion of the taxi. She was then on my right. She was then walking along the centre of the zebra crossing. The old lady fell down. The taxi moved over her and her body was pushed forward.

I quickly parked my scooter by the side and went up to the taxi. With the help of many passers by we lifted the old woman from underneath. The old woman was still conscious.

. . . . . .

The car NA. 3317 came down at slightly over 30 m.p.h. When I first saw the car I did not see clearly the distance between them. I guess the distance was 15 feet to 16 feet. The crash was a short while after the taxi pulled up."

In cross-examination he said:

" . . . . . .

Q. The taxi driver had just spotted the lady and managed just to stop?

A. Yes.

Q. The accident happened because the car driver had no chance to stop?

A. Yes.

Q. Did you see the taxi driver give any hand signals of stopping?

A. No."